

R.D. # 008-05
Hudson, New Hampshire

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

GAME CREEK VIDEO, LLC¹
Employer

and

CASE 22-RC-12491

**INTERNATIONAL ALLIANCE
OF THEATRICAL STAGE EMPLOYEES,
MOVING PICTURE TECHNICIANS,
ARTISTS AND ALLIED CRAFTS OF THE
UNITED STATES, ITS TERRITORIES AND
CANADA, AFL-CIO, CLC²**
Petitioner

and

**RADIO AND TELEVISION BROADCAST
ENGINEERS UNION, LOCAL 1212,
INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, AFL-CIO³**
Intervenor

DECISION AND ORDER

I. INTRODUCTION

International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, AFL-CIO, CLC, (herein IATSE or the Petitioner) filed a petition, amended at hearing,

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner appears as amended at the hearing.

³ The name of the Intervenor appears as amended at the hearing.

under Section 9(c) of the National Labor Relations Act, seeking to represent a unit of approximately 100 employees consisting of all regular part-time freelance sports and events broadcast technicians including camera operators, video operators, digital recording device operators, tape operators, audio technicians, graphics technicians, technical directors, audio assistants, video assistants, utility technicians, box and score operators, and others in similar technical positions performing in pre-production, production and post-production work in connection with the telecasting of sports and other events in the New York Metropolitan area. Game Creek Video, LLC (herein Game Creek or the Employer) asserts, *inter alia*, that the petitioned-for employees are independent contractors and not employees under the Act. Radio and Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO (herein Local 1212 or the Intervenor) seeks to dismiss the petition on the basis of an existing collective bargaining agreement (CBA) between it and Barry Fialk, Inc. (herein Fialk) covering the petitioned-for employees.⁴

For the reasons set forth below, I find Game Creek has met its burden in establishing that the petitioned for employees are independent contractors, not statutory employees, and I shall dismiss the instant petition on that basis.⁵

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

⁴ As explained below, Barry Fialk, Inc. is an entity which provides freelance technicians to other entities. It is on the basis of this asserted relationship that the Intervenor was permitted to intervene in this matter.

⁵ Having found that the petitioned for employees are not employees under the Act, I find it unnecessary to make findings as to other issues raised in this matter, such as whether Game Creek is the employer of the sought after employees; whether Game Creek, Fialk and rights holders (as described *infra*) or some permutation of these entities is the employees' employer; or whether the asserted collective bargaining agreement between Fialk and the Intervenor is a bar to the processing of the petition.

Upon the entire record in this proceeding,⁶ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.⁷

3. The labor organizations involved claim to represent certain employees of the Employer.⁸

4. No question affecting commerce exists concerning representation in this matter within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, for the following reasons:

II. FACTS:

A. Game Creek's Operations

Game Creek is a New Hampshire limited liability corporation, in existence since 1993, that provides remote television production units and equipment to major television broadcasters, cable providers and other entities which televise sporting and other events from locations outside studio settings. Game Creek is sometimes referred to in the industry as a "trucking company." The remote television production units it provides are also referred to as mobile units or production trucks. These mobile units are tractor trailers, typically 48 to 53 feet long, which have been specially modified to include television production equipment. Some equipment,

⁶ Briefs filed by the parties involved have been considered.

⁷ The Employer is a New Hampshire limited liability corporation engaged in the mobile trucking television service industry. During the preceding 12 months, the Employer derived gross revenue in excess of \$50,000 from services rendered to various customers located outside the State of New Jersey.

⁸ The parties stipulated and I find that the Petitioner and the Intervenor are labor organizations within the meaning of Section 2(5) of the Act.

such as monitor walls, video tape machines, audio mixing boards and seats for the individuals operating and directing such equipment, is built directly into the interior of the mobile unit. Other equipment that Game Creek provides, such as cameras, cables, tripods and microphones, is moveable and contained in storage units located under the mobile unit.

Game Creek provides mobile units to its clients, which include MSG Network, YES Network, USA Network, E Network, ESPN, CBS, ABC, NBC, FOX, HBO, assorted local television stations and affiliate stations around the country. The aforementioned entities are considered “rights holders,” i.e., those who hold the rights to broadcast or cablecast sporting and other events.⁹ For example, in Boston, Massachusetts, the rights holder for Boston Celtics games is Fox Sports New England and for Boston Bruins games it is NESIN.

On each mobile unit provided by Game Creek, there are at least an Engineer-in-Charge (EIC), a Maintenance Engineer and a driver.¹⁰ When Game Creek supplies two tractor trailer combinations in tandem, then two drivers, in addition to the two engineers, are dispatched with the mobile unit. Drivers are responsible for getting the mobile units from Hudson, New Hampshire to the client’s location; expanding them; placing out the stairs leading to the mobile unit; and making sure the mobile unit is clean inside and out. The responsibility of the engineers, who do not travel with the mobile unit, is two-fold. One is to set up the mobile unit in the manner the client has specified and the second is to respond to any issues relating to repair or maintenance

⁹ Game Creek does not supply its mobile units solely to sporting event rights holders; it has also provided mobile units, for example to the most recent Presidential and Vice-Presidential debates, the Presidential Inauguration and the Academy Awards.

¹⁰ Game Creek agrees that these individuals are its employees.

that might occur, either during the course of set-up for the event or during the event itself.

The record reveals that in the New York metropolitan area, Game Creek, during the 2003 to 2004 National Hockey League (“NHL”) season, had contracts with Nassau Coliseum in Uniondale, New York and Madison Square Garden in New York City that granted Game Creek exclusivity to provide mobile production units to the visiting teams’ rights holders at those venues.¹¹ Patrick Sullivan, the Employer’s President, testified that Game Creek does not have such exclusivity at the Meadowlands Arena (“Meadowlands”) in East Rutherford, New Jersey, although Game Creek is the sole trucking company providing mobile production units to the visiting teams’ rights holders that play against the New Jersey Devils (“Devils”) and the New Jersey Nets (“Nets”). In this connection, Game Creek can subcontract its services at the Meadowlands, if it chooses. With respect to home teams in the New York metropolitan area, Game Creek has an arrangement with YES to provide mobile production units when the New York Yankees, New York Mets and Nets are home. No similar arrangements exist between Game Creek and Fox Sports New York for the Devils and New York Islanders or with MSG for the New York Knicks and New York Rangers.

B. Crewing Services

From time-to-time, rights holders further request that Game Creek provide a crew to operate the equipment Game Creek provides on its mobile units and Game

¹¹ Providing mobile production units to visiting teams is commonly referred to as providing the “away feed” or “away show.” This is contrasted with providing mobile production units to home teams, which is referred to as “home feed” or “home show.”

Creek provides such service as an accommodation to the client. Game Creek makes no profit in providing such a crew for the client; doing so is neither a primary nor a secondary function of Game Creek. Altogether, nationwide, requests for Game Creek to provide a crew amount to approximately ten percent of all the events it does.

When a rights holder requests that Game Creek provide a crew to operate equipment, it contacts a crewing service, inasmuch as it does not employ individuals in the technical positions needed to broadcast games or events. In the industry, a crewing service is a company that either a rights holder or trucking company contacts to arrange a technical crew to work equipment located on mobile units. The crewing service recruits freelance technicians to fill the following technical positions: camera operator, video operator, digital recording device operator, tape operator, audio technician, graphic technician, technician director, audio assistant, video assistant, utility technician and box and score operator.¹²

In the New York metropolitan area, the crewing service utilized by Game Creek and/or rights holders is Barry Fialk, Inc., owned by Barry Fialk. Mr. Fialk is also a freelance camera operator who often works with those freelancers he crews for an event. The record reveals that Fialk has contact with approximately 200 freelancers, among whom he exchanges information by e-mail as to dates on which Game Creek needs an event crewed; freelancers respond as to whether or not they are available. If available, Fialk confirms the date with the freelancer as the event nears.

A typical example of a transaction between Game Creek and Fialk involves Game Creek contacting Fialk in July or August of each year, shortly after the NHL

¹² Unless specifically noted, reference to freelancers in this Decision is meant to include the noted classifications which are those sought in the petition.

and National Basketball Association (“NBA”) release their schedules, to advise Fialk that he can expect that for certain of those games his crewing services will be needed. Approximately one month before a scheduled game, Fialk sends Game Creek a crew list which Game Creek in turn forwards to the rights holder.¹³ The rights holder reviews the crew list and sends it back to Game Creek and, in a vast majority of cases, freelancers on the crew list end up doing the event. Occasionally, a rights holder may notify Game Creek that a particular freelancer is not acceptable to it.¹⁴ Game Creek then communicates this information to Fialk, who obtains a substitute. Subsequent to an event, Fialk sends Game Creek his invoice, including the technical classification utilized, the number of freelancers supplied by Fialk, the freelancer rate and his fee.

C. Event Operations

A typical event’s tasks begin with Game Creek’s mobile unit arriving at the site. The driver has the responsibility to park the mobile unit and, if necessary, expand the unit, level it and place the stairs. The driver also ensures the mobile unit is clean inside and out. Thereafter, the Game Creek engineers arrive and power-up the electronic equipment in the mobile unit. The engineers then await direction from the rights holder’s director and/or producer on how they want to see the signal flow in the mobile unit. The rights holder’s director or producer determines the placement of equipment, the flow of the coverage and the actual work of broadcasting the event. In addition to set-up responsibility, the engineers are responsible for addressing any repair and maintenance issues that arise during the course of an event.

¹³ The exact number and type of classifications required for each event is determined by the rights holder and Game Creek does not participate in that decision.

¹⁴ Game Creek reports that in its 10 year relationship with Fialk, it has had approximately two or three instances where rights holders alerted it to issues they had with particular freelancers and made requests that those freelancers not work events.

Sometime after the engineers have set-up the mobile unit, Fialk's freelancers arrive on site, at a reporting time determined by the rights holder. Venue access credentials are waiting for them inside the mobile unit. In the past, freelancers signed a Game Creek generated Crew Sign-In Sheet upon arrival, which was sent to Fialk after the game.¹⁵ Freelancers see the Engineer-in-Charge (EIC), their initial point of contact, who tells the freelancers how much equipment (cameras, microphones, etc.) they will need for the event and where in the venue that equipment will be placed. The EIC also informs the freelancers as to other details of coverage, such as whether pre- and post-game interviews will be in the locker room or hallways, how many announcers are assigned to the event, etc. Essentially, the EIC provides freelancers with information necessary for them to perform their assignments. Once the information is passed along, the EIC opens storage bays under the mobile unit to enable the freelancers to gain access to the equipment they utilize in broadcasting the event. At the end of the event, freelancers return the equipment to the mobile unit for placement back into the storage bays. The equipment is inventoried by the EIC and the storage bays are locked.

The event's director is responsible for overseeing the broadcast production of the event, whereas the producer is responsible for the "creative look" of the event to the home audience. Throughout the event, these two individuals use intercoms provided by Game Creek to issue directions to the freelancers to insure the overall production and creative look of the event, such as specific positions, angles to tilt the

¹⁵ The record reveals that Crew Sign-In Sheets were used until June, 2004; the record is silent as to their use thereafter.

cameras a certain way, pans to other areas of the venue, etc. They also determine at what time the freelancers can leave.

During the event, Game Creek's EIC is not involved with the broadcast and there is virtually no interaction between the EIC and the freelancers, unless there is a maintenance issue with the Game Creek-provided equipment. When there is a maintenance issue, freelancers bring it to the attention of the EIC, who is responsible for correcting the problem.

D. Freelancers

Freelancers generally work an industry standard 10 hours per event. Game Creek has no involvement in the number of hours freelancers work during events. The 10 hours generally includes set-up, the three-plus hour event and break-down. Likewise, Game Creek has no involvement in the rates-of-pay received by freelancers. Rather, the record indicates, for example, that the NBA & NFL league owners establish minimum rates of pay for all freelancers' classifications, which are enumerated on so-called league "rate cards." These established rates for different types of mobile units and equipment used in connection with the broadcasting are national and uniform. The record disclosed that neither Game Creek nor Fialk set or have any input into these rates.

Game Creek does not issue checks to freelancers; rather, it bills its and Fialk's fees to the rights holder and remits to Fialk the amount he is due, pursuant to Fialk's invoice; Fialk then issues checks directly to the freelancers.¹⁶ As a result, Game Creek does not deduct social security, income or other Federal and State taxes, nor

¹⁶ Many freelancers are incorporated as subchapter "S" corporations.

does it provide freelancers with IRS W-2 statements at year's end.¹⁷ Neither Game Creek nor Fialk provide freelancers fringe benefits, such as health, life insurance, long or short-term disability or pension benefits.

Game Creek provides an employee handbook to its EICs, drivers and office personnel, setting forth its terms and conditions of employment; it does not provide the handbook to freelancers. Fialk does not issue a handbook to freelancers.

III. ANALYSIS

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor." 29 U.S.C. § 152(3). In determining whether an individual is an employee or an independent contractor, the Board applies the common law agency test and considers all the incidents of the individual's relationship with the employing entity. *Argix Direct, Inc.*, 343 NLRB No. 108 (2004); *Roadway Package System*, 326 NLRB 842, 850 (1998); *Dial-a-Mattress Operating Corp.*, 326 NLRB 884, 892 (1998); *Slay Transportation Co.*, 331 NLRB 1292, 1293 (2000). The multifactor analysis set forth in Restatement (Second) of Agency, Sec. 220 includes the following factors:

- 1) the control that the employing entity exercises over the details of the work; 2) whether the individual is engaged in a distinct occupation or work; 3) the kind of occupation, including whether, in the locality in question, the work is usually done under the employer's direction or by a specialist without supervision; 4) the skill required in the particular occupation; 5) whether the employer or the individual supplies the instrumentalities, tool, and the place of work for the person doing the work; 6) the length of time the individual is employed; 7) the method of payment, whether by the time or by the job; 8) whether the work in question is part of the

¹⁷ Fialk also does not deduct Federal and State taxes; he issues Form-1099s to freelancers, not W-2s.

employer's regular business; 9) whether the parties believe they are creating an employment relationship; and, 10) whether the principal is in the business.

The determination of whether an individual is an independent contractor is quite fact-sensitive. *NLRB v. United Insurance Co.*, 390 U.S. 254, 258 (1968). The burden is on the party asserting independent contractor status to show that the classifications in question are independent contractors. *BKN, Inc.*, 333 NLRB 143, 144 (2001).

Herein, Game Creek maintains that the freelancers are independent contractors and IATSE contends they are employees. Based upon the record and applicable case law, I find that the Employer has met its burden of establishing that the freelancers at issue here are independent contractors, not employees under the Act.

As noted above, Game Creek exercises no control over the details of the work performed by freelancers. It does not assign duties or responsibilities to the freelancers nor does it exercise any day-to-day control over their work. Such control is left to the rights holder's director and producer. Freelancers receive direction from the director and producer according to their views of how the event should be broadcast to audiences. Freelancers are directed by the director and producer, the individuals with final authority as to the end product, i.e., the visual presentation of the broadcast.

Freelancers in the New York metropolitan area are engaged in distinct and highly skilled functions, which the record indicates are performed with minimal supervision. Freelancers possess skills, knowledge and experience as to the operation of the equipment used. In this regard, the record reveals that freelancers are not supervised in the operational end of their work; rather, they only receive direction in

the artistic objective. It is undisputed that Game Creek assumes Fialk is providing skilled technicians not in need of input from it, as demonstrated by the fact that it provides no on-site supervision to freelancers.

The record reveals that freelancers are not employed for any specific length of time. Since Game Creek does not hire freelancers, they do not complete and submit employment applications. Freelancers are neither required to work any specific number of days for Game Creek nor to return to work for Game Creek. Rather, the opposite is true: freelancers are free to accept or reject working an event for which Game Creek provides its mobile unit. No freelancers work for Game Creek on a day-in and day-out, basis.

Game Creek pays Fialk for the services that freelancers render, based on the event worked, not the amount of time. While freelancers normally work 10-hour days, if there is overtime, Fialk invoices it and it is ultimately paid by the rights holder to Game Creek and to Fialk. As noted earlier, the actual rate of pay of freelancers working NBA and NHL events is prescribed by those leagues. Furthermore, most of the freelancers have incorporated themselves as subchapter "S" corporations and receive Form-1099s from Fialk, not Game Creek.

The work performed and the technical classifications filled by freelancers are not a part of Game Creek's regular business. Rather, Game Creek provides remote television production units and equipment to broadcasters and other providers that televise events from locations outside their studios. In addition, Game Creek provides logistical services: providing engineers on site; arranging for rental equipment if a client requests it; arranging with the venue when the mobile unit will arrive; parking

and setting the mobile unit; and providing power needed to run the equipment. When there is an additional need for a technical crew, Game Creek then also obtains the crew through the use of a crewing service, such as Fialk.

In these circumstances, I find that Game Creek and the freelancers obtained from Fialk have no expectation that they are creating an employment relationship. Wages and other forms of compensation are not determined by Game Creek or Fialk. Game Creek does not provide fringe benefits to the freelancers, while providing them to its employees. Game Creek does not assign or direct freelancers, nor does it supervise them. Game Creek does not discipline, discharge or issue written or oral warnings to freelancers. Aside from a few rare instances of forwarding to Fialk a rights holder's objection to a freelancer, whereupon Fialk provided a substitute, Game Creek has played no role in transfers, lay-offs, recalls or promotions or otherwise affected the work opportunities of freelancers. As a result, I find that there is no employer-employee relationship created by and between Game Creek and freelancers.

I am also mindful that there are some facts favoring finding the freelancers to be statutory employees. The freelancers do not bring their own equipment; that equipment is provided by Game Creek. The record reflects that stadium/arena access credentials are titled in the name of the freelancer, but refer to the freelancer's affiliation as "Game Creek." Nevertheless, I find that in evaluating all of the relevant factors, the other factors recited above weigh far more in favor of independent contractor status than employee status.

Accordingly,

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. The Board in Washington must receive this request by June 9, 2005.

Signed at Newark, New Jersey this 26th day of May 2005.

/s/ Gary T. Kendellen

Gary T. Kendellen, Regional Director
NLRB, Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102